STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2005
v	No. 254213 Oakland Circuit Court
BRANDON JUSTIN BURNS-PERRY, Defendant-Appellant.	LC No. 2003-193006-FC

Before: Fitzgerald, P.J., and Cooper and Kelly, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(b) and armed robbery, MCL 750.529. The trial court sentenced defendant to life in prison without parole for the felony murder conviction and to fifteen to fifty years' imprisonment for the armed robbery conviction. We affirm in part, vacate in part, and remand for correction of defendant's judgment of sentence.

Defendant first argues that the trial court improperly instructed the jury on the malice element necessary to convict him under an aiding and abetting theory of first-degree felony murder. We disagree. We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

To convict a defendant of first-degree felony murder under an aiding and abetting theory the prosecution must prove: (1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave aid and encouragement. *People v Akins*, 259 Mich App 545, 554-555; 675 NW2d 863 (2003). Moreover, "[i]f an aider and abettor participates in a crime with knowledge of the principal's intent to kill or to cause great bodily harm, the aider and abettor is acting with 'wanton and willful disregard' sufficient to support a finding of malice." *People v Riley* (*After Remand*), 468 Mich 135, 141; 659 NW2d 611 (2003).

Because the trial court's instruction to the jury virtually mirrored the elements set forth in *Akins*, we conclude that the trial court's instruction fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Gonzalez*, 256 Mich App 212, 225; 663

NW2d 499 (2003). Therefore, reversal is not warranted on the basis of the trial court's instruction. *Id.*

Defendant next argues that the trial court abused its discretion when it permitted his jury to hear other acts, MRE 404(b) testimony from Rachel Joost regarding events that took place after the crimes giving rise to the charges against him. We disagree.

Because defendant failed to preserve this issue for appellate review, we review it for plain error affecting his substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecution sought to introduce Joost's testimony under the res gestae exception. Under the res gestae exception, "'[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Scholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

The events described by Joost were incident to and intimately related to the events giving rise to the charges against defendant. After the perpetrators shot the hotel clerk and robbed the hotel, they departed the crime scene. However, they returned to the hotel. And upon return, they encountered Joost, a hotel guest. Joost would not have been shot had the events giving rise to the charges against defendant not occurred. Further, Joost's testimony provided an explanation for some of the physical evidence the police found in the hotel. This physical evidence included bloodstains that had no obvious source without testimony about Joost's injury. Because Joost's testimony was admissible under the res gestae exception, the trial court did not err in its admission.

Defendant also argues that the prosecution engaged in misconduct in its closing and rebuttal arguments by appealing to the jury's sympathy and its sense of civic duty. We disagree.

Defendant objected in a timely fashion to the remarks he asserts constituted an impermissible appeal to the jurors' sympathy. However, defendant did not object to the remark he asserts constituted an impermissible appeal to the juror's sense of civic duty. We review preserved claims of prosecutorial misconduct de novo. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not appeal to the jury to sympathize with the victim. *Watson*, *supra* at 591. Nor

may a prosecutor urge the jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282.

Defendant argues that certain remarks by the prosecutor constituted an improper appeal to the jury's sympathy. However, viewing these statements in context, it is clear that the prosecutor referenced specific facts in evidence and made inferences based on those facts. Therefore, we conclude that these statements did not rise to the level of prosecutorial misconduct.

Defendant also asserts that the prosecutor impermissibly appealed to the juror's civic duty. However, viewing this statement in context, it is clear that the prosecutor was simply asking the jurors to use their common sense. He argued that because armed robberies always have the potential to involve violence, defendant, by participating in an armed robbery, acted with willful and wanton disregard of the likelihood of the natural tendency of his behavior to cause death or great bodily harm. Accordingly, this statement did not constitute prosecutorial misconduct.

Finally, defendant argues that his conviction and sentence for both first-degree felony murder and armed robbery violated his right to be free from double jeopardy. We agree.

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *People v Herron,* 464 Mich 593, 599; 628 NW2d 528 (2001). Our Supreme Court has held that it is a violation of double jeopardy protections to convict a defendant of both first-degree felony murder and the predicate felony because the evidence necessary to prove first-degree felony murder requires proof of the underlying lesser-included felony. *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). Our Supreme Court has further held that where one offense is a necessarily included lesser offense of the other, conviction of and sentence for both violates double jeopardy. *Id*. at 343-344. Larceny is a necessarily lesser included offense of armed robbery. *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds in *People v Cornell*, 466 Mich 335 (2002). Because defendant was convicted of both armed robbery and first-degree felony murder having the predicate offense of larceny, defendant's right to be free from double jeopardy was violated. The appropriate remedy is to affirm the conviction of the higher charge and vacate the conviction of the lower charge. *Herron, supra* at 609. Therefore, defendant's conviction of, and sentence for, armed robbery must be vacated.

Affirmed in part, vacated in part, and remanded for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ Jessica R. Cooper